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558-809-74——1

In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 73-1849

ALFRED J. HEMLOCK, PETITIONER

v.

UNITED STATES OF AMERICA

No. 73-1850

HARRY HOFFER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

After a jury trial in the United States District Court for the Southern District of New York, petitioners were convicted of unlawful transportation of stolen money in interstate commerce, in violation of 18 U.S.C. 2314 (four counts), use of fictitious names in carrying out a mail fraud scheme, in violation of 18 U.S.C. 1342 (two counts), mail fraud, in violation of 18 U.S.C. 1341 (two counts), and conspiracy to commit the above crimes, in violation of 18 U.S.C. 371 (one count). Petitioners were sentenced to con-

current terms of four years' imprisonment (Hemlock) and two years' imprisonment (Hoffer) on the conspiracy, transportation and false name counts, and concurrent one-year terms on the mail fraud counts, to run consecutive to the other counts; in addition, Hemlock was fined $10,000. The court of appeals affirmed (Pets. App. A, pp. 1a–34a; 494 F.2d 145).

The pertinent evidence has been set forth in the opinion of the court of appeals and in our opposition to the petitions for writs of certiorari filed by co-defendants Stephen Borgman and John J. Frank (Nos. 73–1603 and 73–1674). Briefly, the evidence showed a fraud perpetrated on Mrs. Marie Trujillo Dominguez, the daughter of the former leader of the Dominican Republic. Following her father's assassination in 1961, Mrs. Dominguez, then aged 21, moved to Spain, where she remained until 1967 (Tr. 182a–185a).[1] Her substantial holdings were maintained in the names of a number of corporations, particularly Planinvest, a Luxembourg corporation.

In the summer of 1967, Mrs. Dominguez traveled to the United States. On arrival in New York City, she was met by co-defendant Frank, a Washington, D.C. attorney whom she had known for years (Tr. 341a, 344a). Frank introduced Mrs. Dominguez to co-defendant Borgman who used the name Miller.

Frank acted as a fiduciary for Mrs. Dominguez. On his advice, Mrs. Dominguez opened a personal check-

[1] "Tr." refers to the trial transcript, contained in the two-volume Appendix in the Court of Appeals, which was lodged with the Clerk of this Court when we filed our brief opposing the certiorari petitions of Borgman and Frank. Pagination is that of the Appendix.

ing account at the Bank of New York on August 14, 1967 (Tr. 188a). He also introduced her to petitioner Hemlock, a New York attorney.

In September, 1967, Hemlock and his law partner, petitioner Hoffer, began advising Mrs. Dominguez concerning a property settlement with her husband. They learned that she had two income-producing assets: mutual funds worth $1 million and a certificate of deposit in a London bank worth $2.4 million. Both assets were in the name of Planinvest. On September 19, Hemlock and Mrs. Dominguez arranged for the London bank's interest payments to be remitted thereafter to her Bank of New York account, and for all communications regarding this account to be sent to Hemlock.

One month later, on Frank's advice, Mrs. Dominguez opened an account in the name of Planinvest at the New York branch of the Bank of London and South America. Frank and Borgman signed signature cards along with Mrs. Dominguez, and the bank statements were to be sent to Frank's law office in Washington. Thereafter, Frank and Borgman took over the day-to-day financial affairs of Mrs. Dominguez; they made deposits and prepared checks for her signature, generally presenting a number at one time for her to sign. Sometimes the amounts on the checks were left blank when Frank or Borgman presented them for signature. On these occasions Mrs. Dominguez was told that the exact amount to be paid was not known (Tr. 210a, 265a).

In the fall of 1967, Frank and Borgman began to recommend to Mrs. Dominguez that she invest in foreign land—Canada in particular—to avoid a loss if

the dollar were devaluated. Mrs. Dominguez agreed to listen to proposals, but specified that she would not consider a purchase over $200,000. This limited acquiescence provided a basis for the fraudulent purchase of two separate parcels of land, valued at less than $90,000, for which Mrs. Dominguez paid $1,140,000.

THE FIRST FRAUDULENT PURCHASE

On January 9, 1968, co-conspirator Arthur Kay purchased a parcel of land in surburban Montreal for $79,000. The deed for the land (largely undeveloped marsh) was executed in the office of Elie Solomon, a "notary."[2] Solomon was instructed to retain the deed pending payment of the $79,000; Kay further informed Solomon that he would be reselling the land to a Bahamian corporation, which in turn would immediately convey it to a European corporation. Later that day either petitioner Hemlock or Hoffer called Solomon to inform him that the subsequent conveyances would be completed in Nassau. Solomon advised the caller that it would be necessary to obtain a resolution from the ultimate purchaser authorizing the purchase. The following day Solomon, Kay and two others flew to Nassau, after first landing in New York City, where they had been joined by Hemlock. Simultaneously, Borgman obtained a certified Planinvest check, signed by Mrs. Dominguez, in the amount of $778,500. Hemlock evidently had this check when he met the Montreal party at the airport and accompanied them

[2] In Canada a notary is a lawyer who specializes in real estate conveyances.

to Nassau. Hoffer met the others at the Nassau airport.

The following morning, January 11, the parties in Nassau met to complete the transfer of the Canadian property. First the property was conveyed from Kay to Columbia Corp., Ltd., a Bahamian corporation represented by a local attorney and his secretary, both of whom affixed their signatures to the deeds. The next step was to be a transfer from Columbia to Planinvest. However, this conveyance was delayed by Solomon because of the absence of any official resolution empowering anyone to execute a deed on behalf of Planinvest; during this interim Hoffer, in Hemlock's presence, informed Solomon that Planinvest would be represented by one Herbert Leftkowitz, but that the deed itself should refer to Planinvest in care of Frank at his Washington office. Hoffer also promised to send Solomon copies of the charters of Columbia and Plaininvest. That afternoon Leftkowitz arrived in possession of what purported to be an appropriate resolution. The signature of Mrs. Dominguez on that resolution was "authenticated" by Hemlock or Hoffer (Tr. 546a). Because the original $79,000 had not yet been paid, the notary still refused to relinquish the deeds, and the meeting was adjourned.

That same day petitioners opened two bank accounts in Nassau, in the names of Columbia Corp., Ltd. and Splindian Investments, Ltd., listing three required signatures: Hemlock, Hoffer and Frank. The $778,500 Planinvest check was then presented for deposit in the Columbia account. The bank refused to allow withdrawals on the deposit until the check had

cleared the Federal Reserve Bank in New York City, a procedure usually requiring eight days. At petitioners' suggestion the bank dispatched one of its secretaries to transport the check by air to New York the same day, thereby permitting the use of the funds the very next day. Petitioners made the arrangements for the secretary's flight.

On January 12, the $778,500 check was processed through the New York Federal Reserve Bank, and the monetary aspects of the real estate transaction were completed when arrangements were made to transfer $79,000 to the notary's trust account. Either Hemlock or Hoffer paid Solomon $500 as compensation for his services. They then returned to New York. The next day, on his stopover in New York en route to Montreal, by pre-arrangement Hoffer met Solomon at the airport and received a "special" copy of the deed from Columbia to Planinvest. This copy, later given to Mrs. Dominguez, did not contain the resolution empowering Leftkowitz to make the purchase on behalf of Planinvest; rather, the copy merely referred to the existence of a "duly authorized" resolution without further identification (Government Exhibit 8). On January 15 Hoffer mailed Solomon a copy of Columbia's charter, showing that it had been incorporated in November 1967.

In late January 1968, Mrs. Dominguez was made aware of the land purchase (but not the purchase price). She could not recall having signed any check to pay for the land. Frank assured Mrs. Dominguez that the purchase was proper and within the bounds she had set.

THE SECOND FRAUDULENT PURCHASE

A week after the first transaction, Kay and Solomon discussed the sale of a portion of a tract partially owned by Solomon, for $8,000. Kay indicated that the order of transfer to Planinvest would be similar to the first transaction, with one Denise Comeau replacing Kay and Splindian Corporation replacing Columbia in the chain of title. Meanwhile, Solomon received a copy of the Planinvest charter from Hoffer via the mails; he was disturbed that the charter did not authorize Planinvest to buy and sell land as required by Canadian law, and asked for a copy of the Luxembourg laws that might bestow such power. Hoffer never furnished any such documents.

On February 2, 1968, Borgman presented for certification to a New York bank a Planinvest check in the amount of $361,500, payable to Splindian Investment, Ltd. The check was certified and returned to Borgman. On February 4 the necessary parties, including Solomon, Kay, and Miss Comeau, flew from Montreal to New York City, met Hemlock there, and then flew to Nassau, where Hoffer was waiting. The following day Leftkowitz appeared and the series of deeds were executed in a course similar to the first transaction. That same day petitioners deposited the $361,500 check in the Splindian account which they had previously opened in Nassau; later, Kay paid Solomon $10,856 for the land and received a $2,856 rebate.

In February or March, 1968, Mrs. Dominguez' former financial secretary, Arcadio Santana, returned to her

employ and assumed control of her finances. Santana learned of the exact amount paid for the first parcel of land and reported the amount to Mrs. Dominguez. Confronted with this information, Frank once again assured Mrs. Dominguez that the land was worth the price paid. Shortly thereafter, petitioners and Frank went to Nassau and directed the bank manager to break the time deposits in the Splindian and Columbian accounts and pay them in cash. The manager withdrew between $300,000 and $600,000 which he gave to petitioners and Frank.

Not satisfied with Frank's assurance as to the value of the first Canadian parcel, Mrs. Dominguez met with Hemlock in June, 1968. Unaware of his role in the transaction, Mrs. Dominguez gave Hemlock the "special" copy of the deed and requested that he investigate the conveyance. During the summer of 1968, Mrs. Dominguez met with petitioners on several occasions. At no time did they reveal their role in the transactions. Then Santana was sent to Montreal to make his own investigation; there he learned of Hemlock's participation. At a meeting with Hemlock, Mrs. Dominguez reported Santana's revelations; Hemlock suggested that someone had been using his name in an unauthorized manner. Mrs. Dominguez also stated that she had learned that the property was not worth what she had paid for it. Hemlock responded by agreeing to arrange a meeting with Frank and Borgman.

The meeting occurred at Hemlock's law office on September 24, 1968. There, Frank admitted that the land was not worth the purchase price. He explained

that the difference had been used to pay off the Central Intelligence Agency because of Mr. Dominguez' alleged involvement in a plot to kill one of her father's assassins. Neither Frank nor Hemlock disclosed to Mrs. Dominguez any of the details of either land transaction. In fact, Mrs. Dominguez had never heard of Herbert Leftkowitz, the person who had acted as Planinvest's representative in Nassau (Tr. 234a). She regarded Frank's explanation as preposterous.

Most of the issues presented by petitioners also have been raised in the companion petitions filed by co-defendants Frank and Borgman, and have been dealt with in our Brief in Opposition in Nos. 73–1603 and 73–1674.

1. As noted in our prior brief, the concurrent sentence doctrine makes it unnecessary for the Court to consider petitioners' attack upon their conviction for violating the fictitious names statute, 18 U.S.C. 1342.[3] *Barnes* v. *United States*, 412 U.S. 837, 848, n. 16. In any event, as stated previously and contrary to petitioners' contention, that statute reaches the instant situation where detection of the fraud is handicapped by the employment of several straw parties using trade names, even though such parties are correctly identified; nothing in the legislative history of the statute supports an opposing view.

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[3] We recognize that in addition to the prison sentence a general fine of $10,000 was imposed upon petitioner Hemlock. However, there is little likelihood that the amount of the fine was affected by the Section 1342 convictions, since the fictitious names statute authorizes a maximum fine of only $1,000, whereas the conspiracy count and the four Section 2314 counts authorize maximum fines of $10,000 for each violation.

2. Petitioners were properly convicted of mail fraud. In our previous brief, in discussing 18 U.S.C. 1341, we detailed the importance of the use of the mails to the fraud. The two counts of mail fraud on which petitioners were convicted involved the letters sent by Hoffer to Solomon, the Canadian notary, on January 15 and January 25, 1968, each containing corporate records which Solomon required in order to form an opinion as to the legality of Planinvest's attempted purchase of the first parcel and the prospective purchase of the second. Since the two mailings were necessary in order to obtain the notary's acquiescence, they were more than incidental to the fraudulent scheme. Unlike the situation in *United States* v. *Maze*, 414 U.S. 395, the mailings here were made by a co-defendant, for the purpose of executing the fraud. Although Hoffer asserts that the mailings were made by him innocently in the ordinary course of his duties as an employee of a law firm representing a party to the legal transaction (Hoffer Pet. 18), the evidence detailed above, showing Hoffer's substantial involvement in the scheme, refutes his argument.

3. Petitioners adopt the argument of petitioner Frank in No. 73–1674 that the district judge erred in allowing two former employees of a Bahamian branch of an American bank to give testimony respecting bank transactions in the face of a Bahamian bank secrecy law. As we noted in our Brief in Opposition to Frank's petition, petitioners may well lack standing to contest the court's ruling that the two former bank employees were not covered by the Bahamian secrecy statute, since the bank's customers were two

corporations (Splindian and Columbia) and not petitioners. Moreover, as shown in our brief, petitioners have not demonstrated that the bank secrecy statute was intended to reach oral testimony unaccompanied by revelations of private bank records; and at all events, principles of comity do not require American citizens to refrain from testifying to facts within their knowledge in an American court concerning the activities of other Americans in a foreign country engaging in a scheme to violate American criminal law.

4. Like Frank and Borgman, petitioners attack the comment by Judge Friendly in the opinion of the court below (Pets. App. A, 15a–16a) that when a defendant has presented no case it may be reasonable for a jury to draw inferences from the prosecution's evidence that would be impermissible if the defendant had supplied a credible exculpatory version. As we noted in our earlier brief, in context, this statement merely means that where, as here, the defense offers no evidence, the jury may well draw from the evidence adduced by the government reasonable inferences adverse to the defendants; and that had the defendants supplied a credible exculpatory version from any source—not limited to their own testimony—certain possible inferences might have been impermissible.

In any event, Judge Friendly's comment obviously had no effect on the proceedings at the trial stage. Petitioners do not attack the adequacy of the district judge's instructions on burden of proof, presumption of innocence, and the right to remain silent without inferences being drawn from such silence. Nor is there any error in the standard actually employed (and

enunciated) by the court of appeals in testing the sufficiency of the evidence. See Pets. App. A, 14a–15a; 494 F. 2d at 153. Accordingly, petitioners' attempt to elevate a passing comment by Judge Friendly to the status of constitutional error is invalid.

5. At trial, Mrs. Dominguez testified to her discovery of the activities of petitioners and their co-defendants. She then described her confrontation with co-defendants Frank and Borgman at Hemlock's law office, at which they admitted that the property purchased with her funds was not worth the price paid and explained that the difference had been used to pay off the Central Intelligence Agency. The conversation occurred in the presence of Hemlock; after Frank and Borgman had left the office, Hemlock also gave the explanation to Mrs. Dominguez' husband (Tr. 226a). No specific objections were made by any defendant to any of this testimony, nor was a request for a limiting instruction ever made thereafter by any party, even after the matter was briefly mentioned in the prosecutor's closing argument (Tr. 868a. See Pets. App. A, p. 20a, n. 16; 494 F. 2d at 155, n. 16).

On appeal, petitioners alleged that the district court should not have allowed Frank's statement to Mrs. Dominguez, made nine months after the second Canadian land transaction, to be admitted against them. Petitioners' attempt to magnify this incident into plain and reversible error is meritless for several reasons beyond their failure to seek an appropriate remedy at trial. First, the statement was not hearsay (as petitioners now contend), since it was not intro-

duced to prove the truth of the matters stated, *i.e.*, that the land was not worth its purchase price or that the price differential had been turned over to the CIA. See *United States* v. *Williamson*, 450 F. 2d 585 (C.A. 5), certiorari denied, 405 U.S. 1026. The statement was relevant to prove Frank's guilty knowledge. It cannot fairly be deemed to have been used by the jury to infer guilt on the part of Hoffer or Hemlock, neither of whom were present when the statement was uttered. In addition, the comments, placed in proper context in the lengthy trial, were not crucial to the government's proof of petitioners' guilt. The jury heard unchallenged testimony of petitioners' active participation in the two fraudulent real estate sales, including their attendance at the meetings in Nassau, their opening of the bank accounts at the Nassau bank and depositing of the checks obtained from Mrs. Dominguez without her knowledge of their inflated amount, and the subsequent removal of a large sum in cash from those accounts. In light of these circumstances, Frank's statement was not a significant part of the case against petitioners.

If hearsay, the declaration would have been admissible under the co-conspirator exception. As the court of appeals noted, the conspiracy was still in effect after the two real estate transactions had been consummated, since there was evidence of a willingness to make further fraudulent deals if the opportunity presented itself, and since petitioners were continuously involved in measures designed to prevent Mrs. Dominguez from recouping her money, such as

removing the funds from the Nassau bank through nontraceable cash withdrawals, concealing Hemlock's role, and defeating all attempts by Mrs. Dominguez to obtain the details of the transactions even after she discovered that the purchases had been made. Frank's statement to her, finally admitting that an overpayment had been made and offering the implausible explanation of payments to the CIA, certainly was intended to protect the success of the fraud by satisfying the curiosity of Mrs. Dominguez regarding the disposition of the excess funds. At that point, "[r]ather than attempting to cover his tracks, [Frank] was making affirmative efforts to salvage what was left in the enterprise." *United States* v. *DeSapio,* 435 F. 2d 272, 284 (C.A. 2), certiorari denied, 402 U.S. 999; see *United States* v. *Etheridge,* 424 F. 2d 951, 964 (C.A. 6), certiorari denied, 400 U.S. 993, 1000. Accordingly, even assuming that it tended to prove petitioners' guilt, Frank's statement could properly have been considered by the jury.

6. Like Frank and Borgman, petitioners contend that the district judge erred in permitting Mrs. Dominguez to make selective use of an interpreter and in instructing the jury that a conviction in a criminal case would not support a judgment in a subsequent civil suit. Our Brief in Opposition in *Borgman* and *Frank* notes the court of appeals' conclusion that with regard to the use of an interpreter, "[a]ll things considered * * * [there was] no abuse of discretion by the judge sufficiently prejudicial to require a reversal" (Pets. App. A, p. 26a; 494 F. 2d at 158), and that

with regard to the instruction on the effect of a conviction upon the civil suit, the judge's failure to give an appropriate collateral estoppel instruction, if error, was not of constitutional dimension and did not warrant reversal under the appropriate harmless error test.

Petitioner Hemlock alleges, however, that the court of appeals erred in employing the harmless error test of *Kotteakos* v. *United States*, 328 U.S. 750, rather than the stricter standard of *Chapman* v. *California*, 386 U.S. 18.[4] To the contrary, since the error complained of was not of constitutional dimension, the court of appeals was not required to declare that it was "harmless beyond a reasonable doubt." *Chapman, supra*, 386 U.S. at 24. The standard of harmless error set forth in *Kotteakos* is still applicable to errors not affecting constitutional rights (*Kotteakos, supra*, 328 U.S. at 764–765):

> If, when all is said and done, the conviction is sure that the error did not influence the jury, or had but very slight effect, the verdict and the judgment should stand, except perhaps where the departure is from a constitutional norm or a specific command of Congress.

See also *United States* v. *Arias-Diaz*, 497 F. 2d 165, 171 (C.A. 5); *United States* v. *Panczko*, 429 F. 2d 683 (C.A. 7), certiorari denied, 400 U.S. 946.

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[4] Petitioner Hoffer's claim that the harmless error test was employed by the Second Circuit in resolving the interpreter question is erroneous (Hoffer Pet. 14–15). As noted, *supra*, the court of appeals held that the district judge did not abuse his discretion in this matter.

In any event, the instructional error was harmless even by the stricter *Chapman* standard. The error dealt with a collateral matter and the jury was already aware of Mrs. Dominguez' substantial interest in the outcome of the case. Nor did the defense offer a written version of the instruction they would have preferred (Rule 30, Fed. R. Crim. P.).

It is therefore respectfully submitted that the petitions for writs of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

SEPTEMBER 1974.

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